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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-846

ANTHONY M. SIRAGUSA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1971

No.

ANTHONY M. SIRAGUSA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony M. Siragusa, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on November 1, 1971 (Appendix C hereto, *infra*, p. A. 9).

Citations to Opinions Below

The yet unreported opinion of the Court of Appeals affirming the judgment of conviction herein, is printed in Appendix A hereto, *infra*, pp. A. 1-A6.

Jurisdiction

The judgment of the Court of Appeals was entered on November 1, 1971 (Appendix C hereto, *infra*, p. A. 9). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Petitioner was convicted on three counts of tax evasion for the calendar years 1961, 1962 and 1963 in violation of 26 U.S.C. 7201.

The questions are:

1. Was the petitioner denied due process and a fair trial by reason of the jury's consideration of extraneous matter which was not received in evidence and which apparently was considered by the jury following its separation after submission by the Court over counsel's objection.

2. Did the Court err in separating the jury after the commencement of their deliberations for three nights and two days over the objection of counsel after it had indicated on four separate occasions during the course of its deliberations that it was unable to reach a verdict.

3. Did the Trial Court err in failing and refusing to charge as requested by the petitioner that where facts or circumstances proved are susceptible of two inferences, one pointing to innocence and the other guilt, the jury must adopt the inference to innocence and acquit the defendant.

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment (due process of law) and the Sixth Amendment (confrontation with witnesses and evidence) of the United States Constitution.

The Federal statutory provision involved is 26 U.S.C. 7201.

These constitutional provisions and statute are reproduced in Appendix D hereto, *infra*, at pp. A-10-A11.

Statement of the Case

Preface

The statement of this case is set forth in three parts. Part I (*infra*, pp. 3-4) contains those facts thought to be necessary for an understanding of the controversy which led to this prosecution.

Part II (*infra*, pp. 4-6) contains a review of the evidence elicited in support of the chief issues at trial prior to the submission of this case to the jury.

Part III (*infra*, pp. 7-8) contains those facts which occurred subsequent to the submission of this case to the jury and which are immediately material to a consideration of the questions presented.

Part I—The Indictment

The indictment herein was filed on March 26, 1969 and contained six counts.* Count One charged Dr. Siragusa, a

* The jury acquitted petitioner on the last three counts which charged him with filing income tax returns for the calendar years 1962, 1963 and 1964, each of which allegedly contained false statements as to material matters, namely, the amount of taxable income for each sixth year.

specialist in internal medicine, with unlawfully, wilfully and knowingly attempting to evade part of the income tax due and owing by him and his wife for the calendar year 1962 by preparing and filing a joint income tax return for that year in which the amount of taxable income and the tax thereon were stated falsely.

Counts Two and Three charged the petitioner similarly for the calendar years 1963 and 1964, respectively.

Part II—Evidence Presented on Trial

The Government's Proof

The prosecution proceeded on the so-called "bank deposits" method of proving the alleged fraudulent nature of petitioner's tax returns. It was the Government's contention that the amounts deposited to Dr. Siragusa's bank accounts minus non-taxable and deductible items exceeded the income reported on his tax returns for each of the years in question. To that end the proof offered by the prosecution was in two distinct parts: unreported interest income and unreported professional fees.

To prove its case, the Government offered witnesses from each of the banks at which petitioner or his wife maintained an account; admissions made by Dr. Siragusa, the testimony of a former employee of petitioner and an employee of the Internal Revenue Service who summarized the evidence.

Through representatives of each of the 11 banks at which the petitioner or his wife maintained an account, the Government attempted to prove the amount of interest which the banks credited on its internal records to each of petitioner's bank accounts for 1962, 1963 and 1964. These amounts were

later summarized and totaled by revenue agent Stanley Shapiro, the Government's final witness, who juxtaposed the bank totals with petitioner's return to arrive at the alleged unreported interest (R. 340-465).

During the course of the Government's investigation into Dr. Siragusa's alleged criminal tax liability, he was interrogated by members of the Intelligence Division of the Intelligence Division of the Internal Revenue Service at their offices in lower Manhattan. A transcript of that interrogation was introduced in evidence at the trial. Following the admission of these exhibits, the prosecutor and a Special Agent of the Internal Revenue Service "reenacted" that interrogation, for the jury.

The reenactment demonstrated that petitioner informed the interrogating agents that he prepared his return by determining the amount he had deposited in his checking account and savings accounts and allowance for living purposes and then deducted what he determined to be his expenses, salaries and other deductions.

Petitioner explained that his returns were prepared at the last minute and it was his belief therefore that errors were made. He further explained that insofar as the alleged undeclared interest was concerned, he had estimated what his interest would be in view of the fact that in many instances he had not presented his passbooks to the savings banks for recording interest; he questioned the date on which 1099's began to be circulated by the banks and stated that other 1099's had not reached him because the banks had sent them to incorrect addresses. Each of these statements was borne out by the evidence adduced on trial.

The final prosecution witness was Revenue Agent Stanley Shapiro. He testified that based on each of the exhibits introduced in evidence, he had prepared summary schedules.

These schedules purportedly illustrate that in 1962 petitioner derived $32,345.98 from his medical practice and $6,299.21 from interest in savings accounts. Juxtaposing petitioner's tax return with these figures, Agent Shapiro asserted $11,479.19 in unreported income and $3,956.29 in unreported tax.

In 1963, accounting to the summaries, Dr. Siragusa derived $23,625.79 from his medical practice and $7,109.19 from interest in savings accounts. This total of $30,734.98 was then viewed vis-a-vis petitioner's tax return and Agent Stapiro concluded that $3,021.14 was unreported income on which there was $900.14 in unreported tax. It is significant that the amount of alleged unreported income for 1963 is less than 10% of petitioner's gross income.

By a similar method Agent Shapiro asserted that petitioner's unreported income in 1964 was $7,804.51 on which there was unreported tax of $2,009.48.

The Defense

The defense through cross-examination and by direct evidence contended that although petitioner may have been careless in the preparation of his income tax returns, he lacked the necessary knowledge to form the requisite specific criminal intent to commit each crime charged.

Part III—The Events Subsequent to the Commencement of the Jury's Deliberations

After hearing two days of testimony, two hours of summation and the Court's charge, the jury commenced its deliberations at 3:45 P.M. on Thursday, January 28, 1971.

At 5:20 P.M. the Court received a communication which stated, "unable to reach an understanding this evening." Thereupon, at 5:25 P.M. with the consent of the defense and prosecution the jury was excused for the night.

On Friday, January 29, the jury resumed its deliberations. At 11:20 A.M. the Court received a note from the jury's forelady which read in part; "Having a difficult time bringing the jury to an agreement."

At 4:45 P.M. another communication was received from the jury. It stated in substance that it was unable to reach a verdict.

Following discussion with the jury and after admonishing them not to discuss this case with anyone or to start deliberations until all were present, the Court over the strenuous objection by the defense separated the jury until Monday, February 1, 1971.

The jury resumed its third day of deliberations at 10:00 A.M. on Monday, February 1. At about 4:00 P.M. the jury, in an apparent compromise, found Dr. Siragusa guilty of three counts of tax evasion (Counts One-Three) and not guilty of filing tax returns containing false statements (Counts Four-Six).

Subsequent to the discharge of the jury, the defense on the day of sentencing, learned for the first time that apparently one or more of the jurors had returned to deliberate

on Monday carrying *a copy of the instruction booklet, tax schedules and income tax forms for 1970.* This highly prejudicial, irrelevant and hearsay document had not been placed in evidence either by the defense or prosecution. The instructions in the tax booklet (Court's Ex. 1) relating to interest income, one of the main issues at trial, was bracketed, presumably by the jury during the course of its deliberations.

On learning of the jury's misconduct, the defense moved forthwith for a new trial and requested a hearing to examine the jurors to develop the facts bearing upon the question of the introduction of the extraneous non-evidence. Both motions were denied.

Reasons for Granting the Writ

This case involves the denial of petitioner's constitutional right to confront the witnesses and evidence against him. Such denial occurred as a direct result of the practice approved by the Court of Appeals for the Second Circuit which allows a jury to be separated after commencement of its deliberations. *United States* v. *Breland*, 379 F.2d 721 (CA 2, 1967). Such practice has been condemned by the Court of Appeals for the Seventh Circuit. [See *United States* v. *Panczko*, 353 F.2d 676 (1965) and *United States* v. *D'Antonio*, 342 F.2d 667 (1965)]. It has been approved by the Court of Appeals for the Sixth Circuit. (*United States* v. *Acuff*, 410 F.2d 463 (CA 6, 1969).) Additionally, although many of the states have provided statutory guidelines governing the separation of a jury subsequent to the submission of the case to such jury (e.g., §270.45 of the New York Criminal Procedure Law), there is no corresponding Federal rule or statute.

It appears to be incumbent upon this Court in the exercise of its supervisory power to correct the conflict among the circuits and to provide adequate guidelines for the District Courts with respect to jury separation.

Petitioner's Point III *infra* (pp. 14-16) raises the substantial question as to whether the trial court's failure to charge the "two inference rule", as requested by the petitioner, was so prejudicial as to deny him a fair trial. This question is a particularly apt one for consideration by this Court inasmuch as determinations by Courts of Appeals for several circuits appear to be in conflict. *United States* v. *Jones*, 418 F.2d 818 (CA 8, 1969); *Busby* v. *United States*, 278 F.2d 220 (CA 5, 1960); *Whaley* v. *United States*, 362 F.2d 938 (CA 9, 1966) and *United States* v. *Grunbergen*, 431 F.2d 1062, 1066 (CA 2, 1970). The Court below recognized the existence of conflict among the circuits (p. A6).

Inasmuch as the "two inference" rule has applicability in cases where circumstantial evidence is used, the issues raised herein with respect to that issue merit consideration by this Court.

ARGUMENT

POINT I

The misconduct of the jury in viewing documents not in evidence unduly prejudiced petitioner and was manifestly a denial of his constitutional rights to confront the witnesses and evidence against him and to a fair trial.

The conduct of the jury in the case at bar was improper and, as will be demonstrated below, so tainted its verdict as to require this Court to vacate the judgment of conviction.

Colt. v. *United States,* 190 Fed. 305, 310 (CA 8, 1911); *United States* v. *Adams,* 385 F.2d 548 (CA 2, 1967), and *Dallago* v. *United States,* 427 F.2d 546 (CA D.C., 1969).

In *United States* v. *Adams, supra,* a case similar to the one at bar, it was held:

> "*But the principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted.*" 385 F.2d at pp. 550-551 (Emphasis supplied)

In the instant case, the standard of "the slightest possibility of harm" is more than met. The "non-evidence" which apparently influenced this jury's verdict was in writing and was hearsay which would not have been admissible if offered in evidence. The instruction booklet was never mentioned during the trial. It was apparently seen by the jury for the first time during its deliberations. The "non-evidence" dealt with a key element of the defense, e.g., the petitioner's lack of knowledge of income earned in a passbook not presented to a bank for several years and on which interest was not recorded. Cf. *James* v. *United States,* 416 F.2d 467 (CA 5, 1969) and *Osborne* v. *United States,* 351 F.2d 111 (CA 8, 1965).

Similarly, in *United States* v. *Grady,* 185 F.2d 273, 275 (CA 7, 1950), the Court stated:

> "True it is possible that defendant suffered no harm by reason of the affidavit going to the jury; in fact, it could be that the affidavit was not seen by a single member of the jury. On the other hand, it could and might have been used effectively in persuading jurors

> otherwise doubtful or opposed to conviction to agree to a verdict favorable to the government. And it is sufficient to require a reversal if, in one judgment, the error might have operated to the substantial injury of the defendant."

In the case of such inherently prejudicial outside influences as were here present, the violation of petitioner's Sixth Amendment rights require that the verdict be set aside. See *People* v. *Crimmins*, 33 A.D.2d 793, 307 N.Y.S.2d 81, affd. 26 N.Y.2d 319, 310 N.Y.S.2d 300 (1970); *People* v. *DeLucia*, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 530 (1967); *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (CA 4, 1964). In *Mattox* v. *United States*, 146 U.S. 140, 150 (1892), this Court gave notice that it would not tolerate any grounds of suspicion that the administration of justice had been interfered with.

See, also, *Parker* v. *Gladden*, 385 U.S. 363; *United States* v. *Brandenburg*, 155 F.2d 110 (CA 3, 1946) and *Wheaton* v. *United States*, 133 F.2d 522, 527 (CA 8, 1943) where the courts discussed the familiar maxim that a jury must pass upon a case free from external influences. In fact, some courts have gone so far as to reverse judgments because of the jury's unauthorized use of a dictionary. See *In Re Collins*, 18 N.J. Misc. 492, 15 A.2d 98; *Palestroni* v. *Jacobs*, 10 N.J. Super. 266, 77 A.D. 183; *Daniels* v. *Barker*, 89 N.H. 46, 200 A. 410; *Cooper* v. *State*, 103 Ga. 63, 29 S.E. 439; *Long* v. *Payne*, 198 App. Div. 667, 190 N.Y.S. 803 and the *American Bar Association Standards Relating to Trial by Jury*, § 5.1 *and the commentaries thereto* at p. 130.

The respondent may urge that inasmuch as the Court charged the jury on the law with respect to accrued interest,

no harm resulted from the jury's misconduct. This position however is untenable as a matter of fact and law.

The instructions contained in the tax instruction booklet could not have been offered in evidence and it was the duty of the jury to take their instructions on the law "exclusively" from the Court, without explanation from outside sources. *Long* v. *Payne, supra.* During the trial, the defense urged that in 1962, a year in which Form 1099's were not sent, petitioner estimated his interest income, and for 1963 and 1964 petitioner used those 1099's he had received in declaring his interest income. The Court reflected this defense in its charge. In contradistinction, the 1970 instructions do not mention Form 1099 but state inter alia "You must report any interest you received or which was credited to your account (whether entered in your passbook or not) and which you can withdraw." *A fortiori* the defense that Dr. Siragusa did not have the requisite criminal intent because he lacked the necessary knowledge to form such intent based on failure to receive form's 1099 is destroyed.

POINT II

The jury's misconduct occurred as a direct result of the Trial Court's error in allowing the jury after commencement of its deliberations to separate for three nights and two days over the objection of the defense and after the jury had on four occasions expressed its inability to reach a verdict.

Over the specific objection of the defense, the Court below allowed the jury after commencement of its deliberations to separate for three nights and two days. In *United States* v. *Panczko*, 353 F.2d 676 (CA 7, 1965) the Seventh Circuit Court of Appeals reversed and held:

> "We hold that the failure by the court to sequestor the jury overnight during its deliberations had a two-pronged effect, first, of exposing the released jurors to exposure to those who might, by printed or spoken word, attempt to influence their official action, and secondly, imposing upon the jurors, especially the women, unnecessary and serious inconvenience." 353 F.2d at p. 678*

To the same extent see *United States* v. *D'Antonio*, 342 F. 2d 667 (CA 7, 1965).

In *D'Antonio*, the Seventh Circuit sitting *en banc* reversed a judgment of conviction of theft of goods from interstate commerce, where the district court permitted the jury to separate after commencing its deliberations. The Court held:

> "At no time is it more essential that the jury should be immunized from outside influence than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion."

In contradistinction to *Panczko* and *D'Antonio* are *United States* v. *Breland*, 376 F.2d 721 (CA 2, 1967) and *United States* v. *Acuff*, 410 F.2d 463 (CA 6, 1969), cert. denied 396 U.S. 830 (1969), which held that separation of a jury after the case has been submitted to them is a matter of discretion for the trial court. Compare also *Tyler* v. *United States*, 397 F.2d 565 (CA 5, 1968) and *Cardarella* v. *United States*, 375 F.2d 222 (CA 8, 1967), which sustain separation where there has been consent of the defense.

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* In the case at bar, the jury consisted of six women, one of whom had a round trip of 176 miles from her home to the courthouse.

A survey of applicable state law reveals that 40 states including all of those within the second circuit prohibit jury separation after submission of a case for deliberations, while 10 states permit separation within the discretion of the trial judge.*

POINT III

The Trial Court erred in failing and refusing to charge as requested by the petitioner that where facts or circumstances proved are susceptible of two inferences, one pointing to innocence and the other to guilt, the jury must adopt the inference pointing to innocence and acquit the petitioner.

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, the defense requested the District Court to charge that

> "Where facts or circumstances proved are susceptible of two inferences, one pointing to innocence and the other to guilt, you must adopt the inference pointing to innocence and acquit the defendant. The burden of proof is upon the Government to establish the defendant's guilt beyond a reasonable doubt; that burden is not upon the defendant to establish his innocence."

The Court refused to charge as requested and specific exception was taken (R. 504). In refusing to so charge, the Court below ignored a well defined line of cases specifically approving the requested language. See, *McCoy* v. *United States*, 169 F.2d 776 (CA 9, 1948); *Karu* v. *United States*, 158 F.2d 568, 570 (CA 9, 1946); *Kassin* v. *United*

* A compilation of the laws of each of the states appears in Appendix E, *infra*, pp. A12-A14.

States, 87 F.2d 183, 194 (CA 5, 1937); *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737, 740 (CA 8, 1909); *Grantillo* v. *United States*, 3 F.2d 117, 118 (CA 8, 1924); *Gargotta* v. *United States*, 77 F.2d. 977, 981 (CA 8, 1935); *Graceffo* v. *United States*, 46 F.2d 852, 853 (CA 3, 1931); *Leslie* v. *United States*, 43 F.2d 288, 289 (CA 10, 1930) and *Nosowitz* v. *United States*, 282 Fed. 575 (CA 2, 1922).

The failure to charge as requested on the "two inference rule" in the instant case was particularly prejudicial inasmuch as the bulk of the prosecution's evidence was circumstantial and capable of two inferences. Compare *Partson* v. *United States*, 20 F.2d 127 (CA 8, 1927); *United States* v. *Standard Oil Co.*, 24 F. Supp. 575 (D.C.W.D. Wisc. 1938) and *Romano* v. *United States*, 9 F.2d 522 (CA 2, 1925). In *Romano*, a prosecution for smuggling, the Second Circuit, reaffirming *Nosowitz*, held that where facts are consistent with innocence as with guilt, it was the duty of the district court to direct a verdict of acquittal.

More recently, in *South* v. *United States*, 412 F.2d 697, 699 (CA 5, 1969), the Court of Appeals for the Fifth Circuit in an interstate gambling prosecution, held:

> "The test in circumstantial evidence cases is whether or not the jury could conclude that the inferences to be reasonably drawn from the evidence are consistent with the guilt of the accused and inconsistent with '. . . every reasonable hypothesis of his innocence.'" 412 F.2d at p. 699 (citations omitted)

The respondent may contend that the legal principle enunciated in the above cited cases has been rejected by the this Court in *Holland* v. *United States*, 348 U.S. 121 (1954). However, the majority of circuits have ruled contrary in cases decided subsequent to *Holland*. See, for example,

United States v. *Jones*, 418 F.2d 818 (CA 8, 1969); *Busby* v. *United States*, 278 F.2d 220 (CA 5, 1969); *Whaley* v. *United States*, 362 F.2d 938 (CA 9, 1966).

As stated in *Jones*:

> "Notwithstanding the *Holland* rule, the principles relied on here are certainly still applicable to criminal cases. Where the government's evidence is equally as strong to infer innocence of the crime charged, as it is to infer guilt, we are not dealing in the realm of credibility, but legal sufficiency and a court has the duty to direct an acquittal. As Judge Van Oosterhout recently stated in Lerma v. United States, 387 F.2d 187, 188 (8 Cir. 1968):
>
> > 'The court properly instructed the jury on the circumstantial evidence, including therein the following: 'If, however, circumstances to be considered in determining defendant's guilt are just as consistent with innocence as guilt, then the verdict must be one of not guilty.' See Byrth v. United States, 8 Cir., 327 F.2d 917, 919; Sykes v. United States, 8 Cir., 312 F.2d 232, 235.' "

CONCLUSION

For all of the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

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ALLAN J. MOROKNEK

December 22, 1971

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—September Term, 1971

(Submitted September 13, 1971 Decided November 1, 1971)

DOCKET No. 71-1426

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY M. SIRAGUSA,

Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from conviction on three counts of evasion of personal federal income tax on trial to the jury in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Affirmed.

JOSEPH E. BRILL, New York, N. Y. (John L. Pollok, New York, N. Y., of counsel), *for Appellant.*

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, Ross Sandler and Peter F. Rient, Asst. United States Attorneys, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, convicting appellant, Dr. Anthony Siragusa, after a six-day jury trial, on three counts of evasion of personal federal income tax for the calendar years 1962, 1963 and 1964, in violation of 26 U.S.C. §7201. Appellant was sentenced to 30 days imprisonment on each count, to be served concurrently, and was ordered to pay a fine of $5,000 on counts one and three, and $1,000 on count two, that is, $11,000 plus the costs of prosecution. Execution of sentence was stayed pending appeal. At the same trial, appellant was acquitted of three counts of filing a false tax return for the calendar years 1962-64. We find no reversible error and affirm the judgment.

Using the bank deposits method of proving tax evasion, the government introduced evidence to show that appellant received more money from professional fees and interest on savings bank deposits than he had reported on his tax returns during the years in question. Summing up the information the government had obtained from the numerous banks at which appellant had deposits, from a former employee of appellant, and from appellant himself, a revenue agent calculated the deficiency in tax due to be $3,956.29 for 1962, $900.14 for 1963, and $2,209.48 for 1964. The appellant does not contest the fact that the amounts on the tax returns may be in error. He claimed that, of his and his wife's 23 savings accounts, some were inactive during those years, and the passbooks were not presented for the recording of accrued interest. He also claimed that he was hurried in filling out the tax returns and that he estimated the

amount of interest and fees to cover that income for which he did not have exact figures. The government introduced evidence which raised doubt about the sufficiency of these explanations.

The main issue, then, was one of knowledge and wilfullness: did Dr. Siragusa know that he reported less than his income for those years, and did he wilfully evade his full tax responsibility? After two and a half days of testimony, the jury began deliberating late on a Thursday afternoon. When they did not come to agreement by 6:00, the court, with the consent of counsel, allowed them to disperse for the night, cautioning them not to discuss the case with anyone. The jury resumed deliberations on Friday, and at 4:45 indicated that they were unable to reach a verdict on any of the counts. After a further unsuccessful attempt to come to some agreement that afternoon, a majority indicated that continued discussion might be productive, and they were requested by the court to return on Monday to deliberate further. This action was taken over objection of defense counsel, who argued that the jury ought not be separated for such a length of time, particularly after they had indicated a repeated inability to agree on any verdict.

The jury met on Monday and at about 4:00 p.m., they announced that they had found Dr. Siragusa guilty of three counts of tax evasion and not guilty of three counts of filing false returns.

When counsel reappeared on the date set for sentencing, the court revealed that after the jury had been dismissed, his law clerk had found a 1970 Federal Income Tax Booklet in the jury room.[1] Both counsel agreed that the booklet

[1] This is a booklet sent out in the millions by the Internal Revenue Service to inform taxpayers on how to fill out their returns.

had not been put into evidence. A pencil mark bracketed a portion of the book which said:

> You must report any interest you received or which was credited to your account (whether entered in your passbook or not) and which you can withdraw.

Appellant's motion for a new trial based on the prejudicial nature of this non-evidentiary, hearsay material was denied, as was a motion for a hearing to examine the jury on the presence of the booklet and their use of it in their deliberations. The denial was based on the fact that the substance of the information in the circled area had been entered in evidence at the trial.

Appellant raises several points on this appeal. His main contention is that the introduction of non-evidentiary material into the jury room, through no fault of appellant, vitiates the verdict in the case and calls for a new trial. He also claims that a hearing on the circumstances surrounding the presence of the booklet ought to have been held by the court. Further, in this connection, he claims that the failure to sequester the jury over the weekend while it was in the midst of deliberation was the cause of the introduction of the extraneous material, presumably by one of the jurors anxious to persuade a hesitant fellow-juror.[2]

The rule that nothing which has not been introduced into evidence may go to the jury room is fundamental. However, the court below found that the booklet had no preju-

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[2] There were two jurors who felt, on Friday afternoon, that agreement on the case would be impossible; one of them was a woman who lived 88 miles from the courthouse and was anxious for the trial to be concluded.

dicial effect because the information in the marked section had been introduced into evidence during the trial, and we agree. It added nothing to the evidence and instructions already before the jury.

The claim that the failure to sequester led to the difficulty here raises primarily a question of whether the court abused its discretion in allowing the jury to disperse for the weekend. The trial court has wide discretion in such a matter to decide, depending on the nature of the case, whether to keep the jury together.[3] While the court here might have ruled otherwise than to ask the jury to return after a day and a half of deliberation and several communications regarding their inability to agree on any count, we cannot say that it was an abuse of discretion to do as he did in view of the time and effort already spent, and the fact that it was not a sensational trial or notorious defendant likely to arouse great public interest and danger of outside pressures.

The other issues raised by appellant do not merit reversal. His second claim is that the evidence on the second count of tax evasion was insufficient to warrant sending it to the jury or sustaining a verdict of guilty. This seems to be a claim that the amounts in question were so small and the possibility that the appellant might not have been informed by his banks so great that a reasonable man would have to have a reasonable doubt about his guilt. In this case, the credibility of defendant's explanations to the

[3] *United States* v. *Breland*, 376 F.2d 721 (2d Cir. 1967); *United States* v. *Acuff*, 410 F.2d 403 (6 Cir. 1969), *cert. denied*, 396 U.S. 830 (1969). Appellant cites some cases going the other way. However, some are earlier than the *Breland* case and others involve threats or crimes of violence and attendant publicity.

agents, the inferences the jury had to draw about knowledge and wilfullness from the conflicting evidence, and the fact that there was a willful pattern in appellant's behavior over the three-year period, created a situation in which the conclusion of the fact-finder is particularly to be respected. There was surely enough to go to the jury. If the jury believed that there was a pattern and that appellant's behavior was willful, the fact of the smaller amount of deficiency in 1963 is unimportant, as long as it was found by them and can reasonably be seen as substantial.

The third contention is that the court erred in not charging the jury with the "two-inferences" charge. That is, essentially, that when facts and circumstances proven are susceptible of two inferences, one pointing to innocence and the other to guilt, the jury must adopt the one pointing to innocence. This charge was common many years ago, but the Supreme Court, in *Holland* v. *United States*, 348 U.S. 121 (1954), held that it was not essential for the trial court to charge that in order to justify a conviction, where the evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than guilt, or in other words, that if an inference of innocence is possible, it must be believed. Although some circuits have persisted in using or approving this charge, this circuit has not departed from *Holland*.[4] There was no error in the Court's refusal so to charge. The judgment is affirmed.

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[4] *United States* v. *Tutino*, 269 F.2d 488 (2d Cir. 1959); *United States* v. *Woodner*, 317 F.2d 649, 651 (2d Cir.), cert. denied, 375 U.S. 903 (1963); *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1963).

APPENDIX B

Judgment and Commitment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 273

UNITED STATES OF AMERICA

—v.—

ANTHONY M. SIRAGUSA

U. S. District Court
Filed March 17th 1971
S. D. of N. Y.

On this 17th day of March, 1971, came the government and the defendant appeared in person by Joseph E. Brill, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing to the U.S. by filing and causing to be filed false and fraudulent joint income tax returns.

(Title 26, U.S. Code, Section 7201.) as charged in counts 1, 2 and 3 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Appendix B—Judgment and Commitment

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY (30) DAYS on each counts 1, 2 and 3, to run concurrently with each other

—AND—

Defendant is FINED $5,000.00 on each of counts 1 and 3, $1,000.00 on count 2. TOTAL FINES of $11,000.00 plus the cost of prosecution are to be paid.

Payment of the Fines and cost of prosecution are stayed pending appeal.

Defendant released on his own recognizance pending appeal.

IT IS ORDERED that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DUDLEY B. BONSAL
United States District Judge
Clerk

JOHN LIVINGSTON

APPENDIX C

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—September Term, 1971

(Submitted September 13, 1971 Decided November 1, 1971)

Docket No. 71-1426

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY M. SIRAGUSA,

Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from conviction on three counts of evasion of personal federal income tax on trial to the jury in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Affirmed.

JOSEPH E. BRILL, New York, N. Y. (John L. Pollok, New York, N. Y., of counsel), *for Appellant.*

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, Ross Sandler and Peter F. Rient, Asst. United States Attorneys, of counsel), *for Appellee.*

APPENDIX D

Constitutional Provisions and Statutes Involved

Constitutional Provisions and Statutes Involved United States Constitution:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix D—Constitutional Provisions and Statutes Involved

United States Statutes:

26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

APPENDIX E

Compilation of State Law

The following states prohibit separation of the jury after submission of the case to it:

Alabama	—*Golden* v. *State*, 103 So.2d 52, 60 (1958)
Arizona	—17 *ARS. Rules of Crim. Pro.*, Rule 268 and *State* v. *Blevins*, 476 P.2d 860 (1970)
Arkansas	—*Ark. Stat. An.* 43-2121 and *Payne* v. *State*, 295 S.W.2d 312
California	—*Penal Code*, §§1121, 1128, 1135
Connecticut	—*Gen. St. Ann.* Title 51 §245
Delaware	—*Del. Cody An.* Title 10 §4526
Georgia	—*Atlanta Newspapers Inc.* v. *State*, 116 S.E.2d 580, 584 (1960)
Hawaii	—*Haw. Rev. St.* Chapter 635 §32
Idaho	—*Idaho Code* 19-2126
Illinois	—*Ill. Ann. St.* Ch. 38 §115-4(l)
Indiana	—*Burns Ind. Stat. Ano.* Tit. 9 §1810
Iowa	—*State* v. *Billberg*, 229 Iowa 1208, 296 N.W. 396
Kansas	—*State* v. *Haeland*, 157 Kan. 11, 138 P.2d 424
Kentucky	—*Nelson* v. *Commonwealth*, 264 Ky. 47, 94 S.W.2d 29
Louisiana	—*State* v. *Davis*, 237 La. 577 (1959) and LSA-R.S. 15:394
Maine	—*State* v. *Wood*, 144 A.2d 259 (1958)
Maryland	—*Md. An. Code* Article 51 §22 formerly Art. 51 §29
Massachusetts	—*Comm.* v. *Della Porta*, 324 Mass. 193, 85 N.E.2d 248
Minnesota	—*Minn. St. An.* §631.09 and *State* v. *Parrant*, 16 Minn. 778 (1870)

Mississippi	—*Carter* v. *State*, 78 Miss. 348; *Organ* v. *State*, 26 Miss. 78
Missouri	—*State* v. *Shawley*, 334 Mo. 352, 67 S.W.2d 74
Montana	—*State* v. *DeTonancour*, 112 P.2d 1065
Nebraska	—*Sedlacek* v. *State*, 147 Neb. 834, 25 N.W.2d 533 (1946)
Nevada	—*Nev. R.S.* 175.320; 175.365
New Hampshire	—*N.H. Rev. Stat. Anno.*, 519:24; 519:25; 606:5
New York	—*N.Y.C.C.P.* 225.14
North Dakota	—*Rev. Code* 1943 29-2127
Ohio	—*Hepp* v. *State*, 46 Ohio App. 360, 188 N.E. 664 (1936)
Oklahoma	—*Sealy* v. *State*, 59 Okla. Crim. 104, 56 P.2d 903 (1936)
Oregon	—*State* v. *Hecker*, 221 P. 808
So. Carolina	—*State* v. *Emory*, 178 S.C. 461, 183 S.E. 323 (1936)
So. Dakota	—*State* v. *Wolfe*, 61 S.D. 195, 247 N.W. 407
Tennessee	—*Etter* v. *State*, 185 Tenn. 218, 205 S.W.2d 1 (1947)
Texas	—*Tex. Code of Crim. Pro.* 668; *Poston* v. *State*, 121 Tex. Crim. 441, 51 S.W.2d 362
Utah	—*State* v. *Jarett*, 112 Utah 335, 187 P.2d 547
Vermont	—*State* v. *Anderson*, 119 Vt. 355; *State* v. *Brisson*, 201 A.2d 881, 883 (1964)
Virginia	—1950 *Va. Code* 19.1-213 and *Robinson* v. *Comm.*, 28 S.E.2d 10
Washington	—*State* v. *Amundson*, 37 Wash.2d 356, 223 P.2d 1067

Wisconsin	—*State v. Cooper*, 4 Wisc.2d 251, 89 N.W.2d 816, 818 (1958)
Wyoming	—*Wym. St.* Tit. 7 §237

The following states allow separation after submission in the discretion of the Trial Court:

Alaska	—Rule 270 of the *Rules of Crim. Pr.*
Colorado	—*Feldstein v. People*, 410 P.2d 188 (1966)
Florida	—*Fla. Stat. Ann.* §919.02
Michigan	—*People v. Lippert*, 304 Mich. 685, 8 N.W.2d 880
New Jersey	—*N.J. Rev. Rules* 3:7(2)(f) except in capital cases
New Mexico	—*State v. Romero*, 285 P. 497 (1930)
N. Carolina	—*Gen. St. of N.C.* Tit. 9 Sec. 17
Pennsylvania	—*Comm. v. Gockley*, 192 A.2d 693
Rhode Island	—*Gen. Laws of R.I.* 12-17-13
W. Virginia	—*W.Va. Code* 1966 62-3-6

No. 71-846

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY M. STRAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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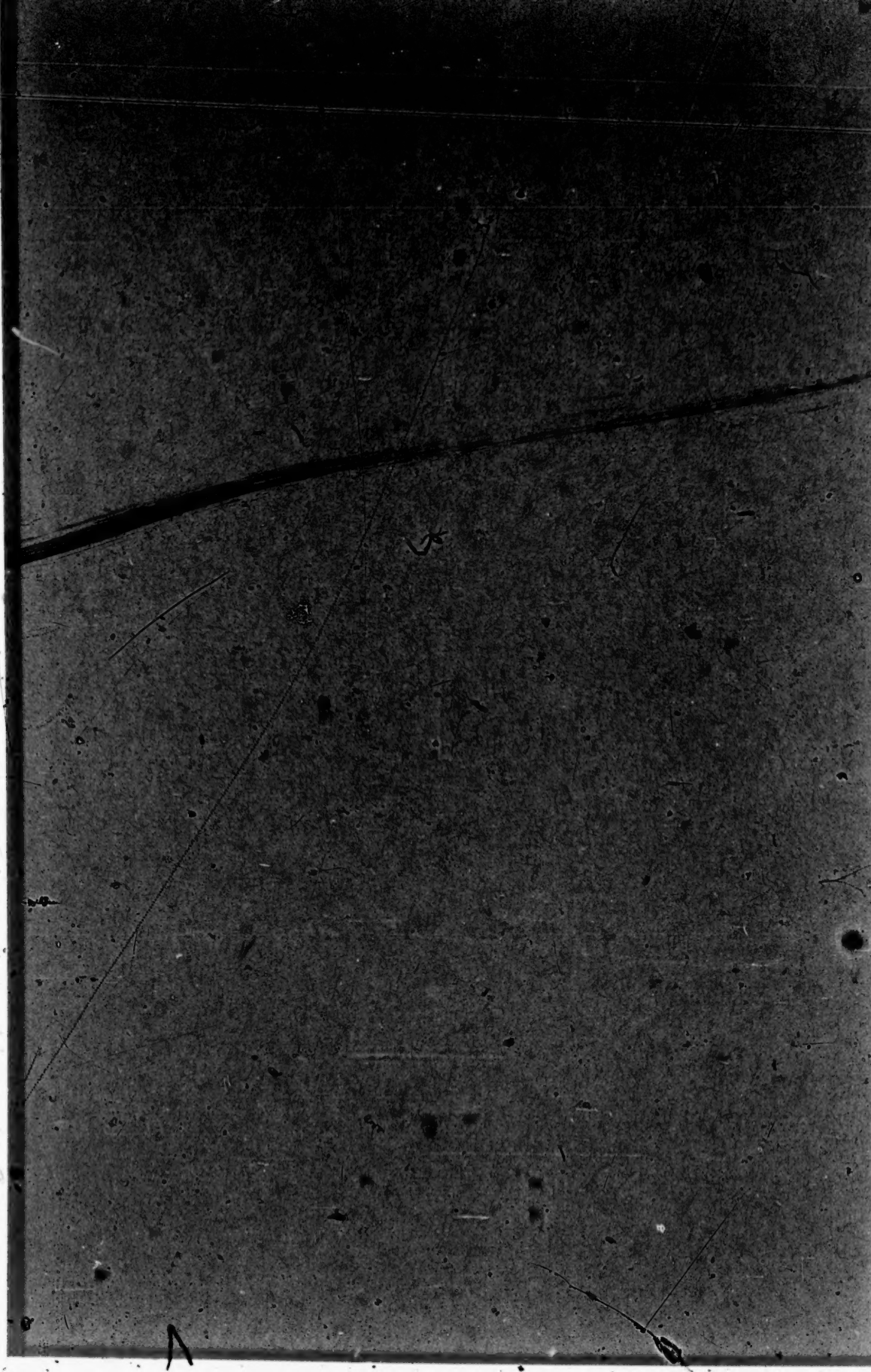

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-846

ANTHONY M. SIRAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1971 (Pet. App. C). On December 7, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to December 31, 1971, and the petition was filed on December 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

457 411—72

QUESTIONS PRESENTED

1. Whether prejudicial error occurred as a result of the unauthorized presence in the jury room of a 1970 Federal Income Tax Booklet, where the substance of the material in the booklet pertinent to the case had been introduced into evidence and included in instructions to the jury.

2. Whether the trial court correctly denied petitioner's request to instruct the jury that they must, where alternative inferences were possible from a fact or circumstance, adopt the inference pointing to innocence.

3. Whether the trial court erred in permitting the jurors to separate after commencing their deliberations.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes are set forth at Pet. App. D.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on three counts of having willfully attempted to evade a large part of his income tax for the years 1962 through 1964 by filing fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. He was sentenced to concurrent 30-day prison sentences on each count, and fined a total of $11,000. The court of appeals affirmed (Pet. App. A).

The government used the bank deposits method, and showed that petitioner's income tax returns understated his true income by more than $22,000, and his true tax by more than $7,000, during the three-year period in question (Govt. Ex. 30). There was also direct proof that, of the $22,000 understatement of income, some $7,100 consisted of unreported interest income realized on 23 separate savings accounts (Govt. Ex. 32). Petitioner did not testify; he urged as a defense that although there were understatements of income, they were not willful.

The jury began deliberations at 2:45 p.m. on Thursday, January 28, 1971. When a verdict had not been reached by 5:25 p.m., the jury was excused and allowed to separate, with instructions to resume deliberations at 10:00 a.m. the next day (App. 51A). Defense counsel stated that he had no objection to this overnight separation (App. 40A, 41A). No verdict was reached on Friday, January 29, and at 5:25 p.m. on that day an adjournment was taken until 10:00 a.m. Monday, February 1, 1971 over the objection of petitioner (App. 66A, 70A). The jurors were again allowed to separate and to go to their respective homes for the weekend (App. 72A). The verdict of guilty was returned on the afternoon of Monday, February 1, 1971 (App. 87A–88A).

After the jury was discharged, a 1970 Federal Income Tax Booklet of instructions for preparing 1970 individual income tax returns, of the kind sent out

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References designated "App." are to the appendix in the court below.

annually to all federal income taxpayers, was discovered in the jury room (App. 86A, 108A–174A). This document had not been received in evidence. A pencil mark bracketed a portion of the book, which stated (App. 130A): "You must report any interest you received or which was credited to your account (whether entered in your passbook or not) and which you can withdraw."

ARGUMENT

1. The presence of the booklet in the jury room did not, as petitioner argues (Pet. 9–12), require a new trial. Petitioner's objection relates solely to the introduction of part of the book. But the jury was instructed before and during the trial to disregard interest income, the deductions were to the same effect as the pages in the book that listed accruals of savings associations credited income regardless of whether petitioner presented his passbooks to the banks for entry of the interest amounts during the years in question (App. 23A, 98A–100A). As the court of appeals concluded, the book added nothing to the evidence and instructions already before the jury (Pet. App. A, p. A5). Compare *Spurgeon v. United States*, 331 F.2d 325, 326 (C.A. 10th), certiorari denied, 377 U.S. 979.

2. Nor did the trial judge err in not charging the jury, as petitioner wanted (Pet. 14–16), that "[w]here facts or circumstances proved are susceptible of two inferences, one pointing to innocence and the other to guilt, you must adopt the inference pointing to innocence and acquit the defendant." This Court's

decision in *Holland* v. *United States*, 348 U.S. 121, makes clear that such an instruction is not required where, as here (App. 14A–15A, 16A, 20A), the jury is properly instructed on the standards for reasonable doubt. Indeed, the Court admonished that in that situation "such an additional instruction on circumstantial evidence is confusing and incorrect" (348 U.S. at 139–140).

3. Contrary to petitioner's contention (Pet. 12–14), the trial judge did not abuse his discretion in allowing the jury to separate over the weekend after they had commenced their deliberations. A majority of the jurors (10 to 2) had requested this action (App. 67A). The court of appeals correctly found no abuse of discretion in the circumstances here—"it was not a sensational trial or notorious defendant likely to arouse great public interest and danger of outside pressures," and a great deal of time and effort had already been spent (Pet. App. 2a–p. A5). Compare *Tyler* v. *United States*, 397 F.2d 565, 567, 569 (C.A. 5), certiorari denied, 394 U.S. 917; *United States* v. *Acuff*, 410 F.2d 463, 466–467 (C.A. 6), certiorari denied, 396 U.S. 830; *Cardarella* v. *United States*, 375 F.2d 222, 227–229 (C.A. 8), certiorari denied, 389 U.S. 882; *Hines* v. *United States*, 365 F.2d 649, 651 (C.A. 10).

Petitioner urges that after a case has been submitted to the jury separation should never be permitted, and claims that the holding below that this is a discretionary matter conflicts with *United States* v. *Panczko*, 353 F.2d 676 (C.A. 7), and *United States* v.